SUPREME COURT OF INDIA

Somnath Sarkar

Vs.

Utpal Basu Mallick

Crl.A.No.1651 of 2013

(T.S.Thakur and Vikramajit Sen JJ.)

07.10.2013

JUDGMENT

VIKRAMAJIT SEN, J.

1. Leave granted. The Appellant before us makes what is essentially a mercy plea – to reduce the sum of Rs.80,000/- imposed on him by way of compensation in lieu of the six months sentence of incarceration imposed by the Metropolitan Magistrate, Calcutta. The Appellant has admittedly issued a cheque in favour of the Respondent No.1- complainant for a sum of Rs.69,500/-, which cheque on presentation was dishonourned with the endorsement 'insufficient funds'. After due compliance with the statutory provisions contained in the Negotiable Instruments Act, 1881 (for short, 'N.I. Act') prosecution was commenced and the aforementioned punishment under Section 138 thereof came to be passed. The payment of compensation amounting to Rs.80,000/- has admittedly been received by the complainant. The Appellant preferred an appeal to the Additional District & Sessions Judge, Calcutta who by judgment dated 5.7.2004 dismissed the appeal and ordered the Appellant to surrender within 15 days. In these circumstances, Criminal Revision Record No.2447 of 2004 was filed in the High Court of Calcutta which was pleased to substitute the six months' sentence by an additional payment of Rs.69,500/-. C.R.R. No.2447 of 2004 was heard and decided along with C.R.R. No.2865 of 2004 also filed by the Appellant. Accordingly, as against the cheque amount of Rs.69,500/- the Appellant is liable to the extent of Rs.1,49,500/-. Faced with the prospects of jail the Appellant had earlier agreed to payment of the additional sum of Rs.80,000/- and for these reasons his plea for reduction thereto was turned down by the High Court in the impugned order. The Appellant was directed to pay a sum of Rs.19,500/- by May 31, 2011 and the balance of

Rs.50,000/- in five equal instalments thereafter. Unfortunately, despite repeated readings of the Orders and related documents, the total liability of the Appellant is not clear as also the payments made till date.

2. Although the learned counsel for the complainant has appeared before us and has endeavoured to persuade us to uphold the impugned order, we find it unnecessary to hear him since the complainant has indubitably already received the sum of the dishonourned cheque alongwith the compensation thereon aggregating Rupees Eighty Thousand.

3. It seems to us that since the Appellant has already faced prosecution in the Magistracy in which he presented virtually no defence, and has thereafter filed an appeal before the Sessions Court, and subsequently two Revisions before the High Court, the ends of justice will be met, were he be directed to pay a sum of Rs.20,000/- only, in default, of which he would be liable to undergo the punishment of simple imprisonment for a term of six months as imposed by the aforementioned Magistrate. The said payment should be made within eight weeks.

4. As already expressed, the language employed by the High Court in the impugned order raises a doubt as to the total liability of the Appellant. A perusal of the sentence passed by the Trial Court as well as the Sessions Judge while dismissing the Appeal also does not completely clarify the position. The cheque amount is Rs.69,500/- and in this regard a sum of Rs.80,000/- has been directed towards compensation which, by virtue of Section 357(3), Code of Criminal Procedure (Cr.P.C.) would be receivable by the complainant. It appears that this sum of Rs.80,000/- has been received by the complainant. The use of the word, ‘additional sum’ in the impugned order has led to considerable confusion. To put the matter finally at rest, we hold that the total compensation payable under Section 138 of the N.I. Act read with Section 357(3), Cr.P.C. is Rs.80,000/-. i.e., the cheque amount of Rs.69,500/- together with Rs.10,500/- which may be seen as constituting interest on the dishonoured cheque. In the arguments addressed before us there appears to be no controversy that this sum has been duly paid to the Respondent-complainant. A reading of the impugned order appears to indicate that the payment of further sum of Rs.69,500/-, in the instalments indicated in that order would be over and above the said sum of Rs.80,000/-. This would violate Section 138 of the N.I. Act inasmuch as it would exceed the double of the cheque amount. This leads us to conclude that the intention of the High Court was that upon deposit/payment of the further sum of Rs.69,500/- (in addition to the earlier sum of Rs.80,000/-), the sentence of imprisonment for six months would stand withdrawn. Learned counsel for the Appellant has fervently submitted that the

Appellant is a man of limited financial means and this position has not been controverted. Palpably, the convict has filed appeals all the way to the Apex Court which would have entailed further expenses of no mean measure. We think that with the receipt of Rs.80,000/-, the complainant has received compensation for the dishonoured cheque as per the adjudication of the Trial Court. In these circumstances, any further payment would be in the nature of fine. Accordingly, we clarify that the Appellant must pay a sum of Rs.80,000/- receivable by the complainant within four weeks from today, if not already paid. The Appellant is also sentenced to payment of a fine of Rs.20,000/-, payable within eight weeks from today, and on the failure to make this payment, would be liable for imprisonment for six months. The Appeal is allowed in these terms.

JUDGMENT
T.S. THAKUR, J.

5. I have had the advantage of going through the order proposed by my esteemed Brother Vikramajit Sen, J. While I entirely agree that the order passed by the High Court directing payment of a sum of Rs.69,500/- over and above Rs.80,000/- already paid under the orders of the Court to the complainant towards compensation needs to be modified to bring the same in tune with Section 138 of Negotiable Instruments Act, 1881, I would like to add a few words of my own in support of that view. Before I do that, I may briefly set out the factual backdrop in which the appellant came to be prosecuted and convicted under the provision mentioned above. The appellant, who is the proprietor of M/s Tarama Medical Centre, Tarakeswar, Hooghly, issued a cheque in favour of the respondent/complainant bearing no.419415 dated 6th September, 1999 drawn on SBI, Tarakeswar Branch for Rs.69,500/- towards discharge of existing liabilities. When the cheque was presented by the complainant through his banker on 6th September, 1999 it was dishonoured for "insufficient funds", which dishonour was communicated to the complainant on 7th October, 1999. The complainant respondent issued a demand notice, which was received by the accused appellant within the prescribed limitation period. However, since the accused failed to repay the amount within time, the complainant filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 on 9th December, 1999.

6. The Metropolitan Magistrate, 6th Court, Calcutta convicted the appellant for the offence under Section 138, Negotiable Instruments Act and sentenced him to six months simple imprisonment and to pay compensation of Rs.80,000/- under Section 357(3) CrPC vide order dated 10th December, 2003 in Case No.C-4490/99. Both the conviction and sentence were upheld by the Additional District

& Sessions Judge of the Fast Track Court in appeal vide order dated 5th July, 2004. In a revision petition filed against the said two orders, the High Court upheld the conviction, but imposed an additional fine of Rs.69,500/- (cheque amount) in lieu of six months simple imprisonment awarded by the Metropolitan Magistrate. That the appellant has paid the compensation amount of Rs.80,000/- in instalments of Rs.30,000/- and Rs.50,000/- is not disputed before us and is evidenced by an affidavit dated 20th November, 2006 filed in CRR No.2447 of 2004 before the Calcutta High Court besides a receipt dated 14th February, 2008 respectively, which are on record.

7. The only question that falls for our determination in the above backdrop is whether the High Court was justified in directing payment of an additional fine of Rs.69,500/- which happens to be the cheque amount also, having regard to the fact that the appellant has already paid the sum of Rs.80,000/- to the complainant towards compensation in obedience to the order made by the Metropolitan Magistrate. There is no gainsaying that the High Court could have sentenced the appellant to imprisonment extending up to two years and/or to payment of fine equivalent to twice the cheque amount. This is evident from the provisions of Section 138 which reads as under:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid. either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-
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> (a) the cheque has been, presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
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> (b) the payee or the holder in due course. of the cheque as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the

receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation.- For the purposes of this section," debt or other liability" means a legally enforceable debt or other liability." (emphasis supplied)

8. In as much as the High Court set aside the sentence of six months simple imprisonment awarded to the appellant there is no quarrel nor any challenge mounted before us. That part of the order could be assailed by the complainant who has not chosen to do so. Whether or not the High Court was justified in setting aside the sentence of imprisonment awarded to the appellant is, therefore, a non-issue before us. Having said that we have no hesitation in adding that the High Court may have indeed been justified in setting aside the sentence of imprisonment awarded to the appellant in the facts and circumstances of the case. We say so having regard to a three- Judge Bench decision of this Court in Damodar S. Prabhu v. Syed Babalal H. (2010) 5 SCC 663 where this Court briefly examined the object sought to be achieved by the provisions of Section 138 and the purpose underlying the punishment provided therein. This Court has held that unlike other crimes, punishment in Section 138 cases is meant more to ensure payment of money rather than to seek retribution. The Court said:

"17....Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque."
(emphasis supplied)

9. This Court also took note of the number of cases involving dishonor of cheques choking the criminal justice system of this country, especially at the level of the Magisterial Courts, and held that dishonor of cheque being a regulatory offence, aimed at ensuring the reliability of negotiable instruments, the provision for imprisonment extending up to two years was only intended to ensure quick recovery of the amount payable under the instrument. The following passages from the decision are in this regard apposite:

> "4...It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, the provision for imposing a `fine which may extent to twice the amount of the cheque' serves a compensatory purpose. What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions.
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> 5. Invariably, the provision of a strong criminal remedy has encouraged the institution of a large number of cases that are relatable to the offence contemplated by Section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates' Courts. As per the 213th Report of the Law Commission of India, more than 38 lakh cheque bouncing cases were pending before various courts in the country as of October 2008. This is putting an unprecedented strain on our judicial system."
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> (emphasis supplied)

10. We do not consider it necessary to examine or exhaustively enumerate situations in which Courts may remain content with imposition of a fine without any sentence of imprisonment. There is considerable judicial authority for the proposition that the Courts can reduce the period of imprisonment depending upon the nature of the transaction, the bona fides of the accused, the contumacy of his conduct, the period for which the prosecution goes on, the amount of the cheque involved, the social strata to which the parties belong, so on and so forth. Some of these factors may indeed make out a case where the Court may impose only a sentence of fine upon the defaulting drawer of the cheque. There is for that purpose considerable discretion vested in the Court concerned which can and ought to be exercised in appropriate cases for good and valid reasons. Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant. In as much as the High Court did so, it committed no jurisdictional error. In the absence of a challenge to the order passed by the High Court deleting the sentence of imprisonment awarded to the appellant, we do not consider it necessary or proper to say anything further at this stage.

11. Coming then to the question whether the additional amount which the High Court has directed the appellant to pay could be levied in lieu of the sentence of imprisonment, we must keep two significant aspects in view. First and foremost is the fact that the power to levy fine is circumscribed under the statute to twice the cheque amount. Even in a case where the Court may be taking a lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. That statutory limit is inviolable and must be respected. The High Court has, in the case at hand, obviously overlooked the statutory limitation on its power to levy a fine. It appears to have proceeded on the basis as though payment of compensation under Section 357 of CrPC is different from the power to levy fine under Section 138, which assumption is not correct. The second aspect relates precisely to the need for appreciating that the power to award compensation is not available under Section 138 of Negotiable Instruments Act. It is only when the Court has determined the amount of fine that the question of paying compensation out of the same would arise. This implies that the process comprises two stages. First, when the Court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the instant case. The second stage comprises invocation of the power to award compensation out of the amount so levied. The High Court does not appear to have followed that process. It has taken payment of Rs.80,000/- as compensation to be distinct from the amount of fine it is imposing equivalent to the cheque amount of Rs.69,500/-. That was not the correct way of looking at the matter. Logically, the High Court should have determined the fine amount to be paid by the appellant, which in no case could go beyond twice the cheque amount, and directed payment of compensation to the complainant out of the same. Viewed thus, the direction of the High Court that the appellant shall pay a further sum of Rs.69,500/- does not appear to be legally sustainable as rightly observed by my erudite Brother Vikramajit Sen, J. I, therefore, entirely agree with my Brother's view that payment of a further sum of Rs.20,000/- towards fine, making a total fine of Rs.1,00,000/- (Rupees one lac) out of which Rs.80,000/- has already been paid as compensation to the complainant, should suffice. The amount of Rs.20,000/- (Rupees twenty thousand) now directed to be paid shall not go to the complainant who is, in our view, suitably compensated by the amount already received by him. In the event of failure to pay the additional amount of Rs.20,000/- the appellant shall undergo imprisonment for a period of six months. With these words, I concur with the order proposed by Brother Vikramajit Sen, J.